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Robert Weisberg

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SUPREME COURT REVIEW

FOREWORD: CRIMINAL PROCEDURE DOCTRINE: SOME VERSIONS OF THE SKEPTICAL

ROBERT WEISBERG*

I. INTRODUCTION

Assessing the product of any new Supreme Court term's efforts in criminal procedure has become a suspiciously attractive intellectual exercise. The criminal procedure decisions of the Supreme Court over the last quarter-century—especially those dealing with rights to exclude evidence under the fourth, fifth, and sixth amendments and the due process clause—provide wonderfully plastic material for political drama. These are the most visible documents in the culture of our legal politics. They represent the repetitive, stark clash between two adversaries, the police and the suspect, who represent, respectively, the state and the citizenry, both in their most morally equivocal guises. Moreover, this rich material comes to us now in a scripted dramatic story—the pattern of expansion of constitutional protection under the Warren Court followed by the reversal of that protection under the Burger Court. Whatever sense it makes to talk of a change in the identity of the Chief Justice as demarking distinct historical periods, the pattern of viewing the doctrine in terms of two opposed historical phases of the Court makes the political melodrama neater and starker.

The conventional view of this doctrinal history has, of course, ensured a voluminous academic literature, since it guarantees commentators a political theme. Nevertheless, this conventional view has lost some of its intellectual attraction in recent years. One reason is precisely that this view is the conventional one: the doctrinal history of the War of the Courts suffers the most ignoble of sins any

* Associate Professor of Law, Stanford Law School. J.D., Stanford Law School, 1979; Ph.D., Harvard University, 1971; B.A., City College of N.Y., 1966.

idea can have—it has become uninteresting. Assessing a new year's set of decisions, we tend to engage in a sort of mechanical outcome counting and evaluation. Though occasionally we hear rumors of drastic revolutionary or counter-revolutionary changes,¹ the new case law chiefly seems to present subtle but predictable new permutations of state-defendant encounters, permutations that manifest minor changes in established doctrine. We then can simply examine where the Burger Court has retrenched on Warren Court due process jurisprudence, noting that it has gone a little farther than, or not quite so far as, the previous terms' cases might have suggested. Indeed, what enhances the sense of mechanical repetition is that even more than in other areas of constitutional law, the criminal procedure opinions themselves seem to be drawn from rhetoric banks in the Justices' word-processors.²

The conventional view, however, suffers from a more substantive flaw: It ultimately seems hollow because it assumes that the opinions are effectual and significant in the very terms in which they are written. The conventional view reflects and reinforces the impression that the doctrinal developments and conflicts in the Supreme Court's criminal procedure case law vitally influence the administration of criminal justice in the United States. Many observers find it very difficult to reconcile this view with sensible observations of the world in which the decisions are assumed to operate—either the small world of the criminal justice system or the wider social world which the criminal justice system is supposed to influence.³ Moreover, it becomes harder to make this reconciliation as the political rhetoric of the opinions becomes grander.

In this Article, I want to set out briefly several forms of the conventional view, illustrated by both the language of the Court and the views of the commentators. Then I will review various ways in which commentators, and to some extent the Justices themselves, have begun, most markedly over the last few years, to reassess and cast doubt on the conventional view of both the meaning and the social effects of the procedural doctrines. In short, I will present a

¹ Before *United States v. Leon*, 468 U.S. 897 (1984), we heard rumors that the impending good-faith exception to the exclusionary rule would apply to all searches, not just those based on warrants. One hears rumors that the more drastic version of the good-faith rule, or the still more drastic steps of repealing the exclusionary rule or applying *Leon* to *Miranda* violations, are imminent.

² A good example of the rhetoric of criminal procedure doctrine is the well-established trope about "totality-of-the-circumstances" tests replacing bright-line rules. See, e.g., Justice Rehnquist's invocation of this trope in *Illinois v. Gates*, 462 U.S. 213, 230-41 (1983).

³ See *infra* notes 47-81 and accompanying text.

taxonomy of what might be called skeptical or critical or revisionist views of the conventional history. These views suggest, sometimes expressly and sometimes obliquely, that the Supreme Court doctrine has been a vastly over-rated and over-invested phenomenon. All of these views suggest some image of the world as resistant to or ignorant of the doctrine or doctrinal changes. Yet they also suggest (again, sometimes expressly, sometimes obliquely) that the doctrine plays primarily symbolic roles in politics, roles which largely distract our attention from important questions about criminal justice.

II. THE CONVENTIONAL HISTORY

What I call the "conventional" view holds or assumes that the Court's criminal procedure decisions are important or effectual in the dramatic terms in which they are often written. It is thus neither a conservative or liberal view although arguably it has both its conservative and liberal versions.⁴ The conventional doctrinal history is that the Warren Court expanded the rights of criminal defendants, thereby in some measure inhibiting or improving the work of the police and prosecutor, and that the Burger Court has significantly reversed the Warren Court's effects. The purest liberal version of the conventional view is that the Warren Court jurisprudence transformed the criminal justice system and sent out wider emanations of political fairness and equality; in the conservative version, the Warren Court drastically hampered the efforts of honest policemen, thus inducing an increase in crime or in the freedom of criminals to escape prosecution.

Conversely, in the liberal version, the Burger Court has brought us closer to what we would call in political symbolic language a police state; however, in the conservative version, the Burger Court has enabled honest policemen to re-establish control over crime. One need not read much academic commentary to observe this conventional view because the ritualized opinions of the Justices state the matter so clearly,⁵ and the conventional commentary tends

⁴ I do not mean to suggest that the liberal and conservative postures on criminal justice are concerned only with the issues of constitutional criminal procedure discussed here, though I think those issues have unfortunately played a central role in contemporary legal politics.

⁵ Compare *Nix v. Williams*, 467 U.S. 431, 445 (1984) (defendant's claim of exclusion "wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice"), with *Illinois v. Gates*, 462 U.S. 213, (1983) (Brennan, J., dissenting) ("today's decision threatens to obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police state where they are the law.") (quoting *Johnson v. United States*, 333 U.S. 1017 (1948)).

to mirror the opinions. Yet most writers on the Supreme Court simply assume that literal changes in doctrine or outcome carry important social and political influence in the very terms in which the opinions speak.⁶

Of course, this conventional view sets up the debate over the doctrine in liberal and conservative terms, but does not resolve it. It establishes the task of liberal judges and commentators as that of (1) asserting the importance of the defendant's interest, either individually or as a surrogate for all people who might become the objects of police action, and asserting that this interest is directly affected by doctrinal holdings; while (2) casting doubt on the state's or public's interest in law enforcement—either by questioning the moral or political legitimacy of the state's interest or by questioning, as an instrumental or empirical matter, whether a doctrinal holding favoring the police would functionally advance that interest. The liberal side often makes its affirmative case by merely asserting or assuming the categorical nature of rights of privacy or freedom from harassment or coercion.⁷ In one sense, the liberals should have an advantage here, because they primarily represent the interest of the individual claimant, an interest that is not falsifiable, and cannot be subject to empirical skepticism as obviously as the law enforcement interest. The defendant's interest can, of course, be subject to philosophical skepticism though it rarely is. The liberals rarely make articulate rights-based arguments and the conservatives rarely make broad philosophical attacks on rights theories.

Of course, the conservative doctrine is occasionally expressed in what can somewhat generously be called the language of political philosophy. The Justices sometimes try to offer a narrowed general view of expectations of privacy,⁸ or to describe social institutions in

⁶ Representative citation is futile here, since by "most writers" I include, for example, the overwhelming majority of law review notes on criminal procedure over the last decade, but some notable examples of commentary that have taken the doctrine extremely seriously are: Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971); Grano, Kirby, Biggers & Ash, *Do any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717 (1974); Chase, *The Burger Court, the Individual, and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. REV. 518 (1977).

⁷ For example, in his dissent in *Leon*, Justice Brennan, before proceeding to argue that the good-faith rule espoused there is based on faulty reasoning even within utilitarian terms, seems to foreclose an utilitarian approach to the fourth amendment. *Leon*, 468 U.S. 897, 930 (1984) (Brennan J., dissenting) ("the Framers of the Bill of Rights insisted that law enforcement efforts be permanently and unambiguously restricted in order to preserve personal freedoms").

⁸ E.g., *Oliver v. United States*, 466 U.S. 170, 178 (1984) (fourth amendment recognizes "that certain enclaves should be free from arbitrary governmental interference")

general terms that suggest the necessary subjugation of the individual to institutional needs.⁹ But the conservative argument has tended instead to take two other forms: (1) finessing the defendant's rights-based arguments by attacking Warren Court principles as merely artificial legal rules bearing only attenuated relationships to those rights; or (2) asserting the countervailing interest in law enforcement. The first of these arguments has been appearing with increased frequency lately as majority opinions seem to underscore the generosity of the Court in retaining legal rules which do not perfectly coincide with constitutional rights. Thus, the Court maintains that the *Miranda* rule is only a constructive presumption to protect the substantive fifth amendment,¹⁰ or that the exclusionary rule is a tangential device for protecting what conservatives might otherwise concede are categorical privacy rights under the fourth amendment.¹¹

However, the conservative side usually has relied on the second argument. It avoids or concedes the issue of the strength of the defendant's interest, and asserts instead that the proper terms of the doctrine are a balancing calculus in which the state's interest frequently is the greater, and that recognizing the defendant's interest would create unacceptable costs. In *United States v. Leon*, for example, Justice White explicitly purports to resolve the good-faith issue "by weighing the costs and benefits of preventing the use in the prosecution's case-in-chief of inherently trustworthy tangible evidence," and notes the "substantial social costs exacted by the exclusionary rule."¹² Justice White asserts that "[b]ecause we find that the rule can have no substantial deterrent effect in the sorts of situations under consideration in this case, . . . we conclude that it cannot pay its way in those situations."¹³

but "[t]here is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields.").

⁹ See *New Jersey v. T.L.O.*, 105 S. Ct. 733, 743 (1985) (balancing "accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools"); *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) ("recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions").

¹⁰ *Oregon v. Elstad*, 105 S. Ct. 1285, 1291 (1985).

¹¹ *Leon*, 468 U.S. 897, 906 (1984).

¹² *Id.* Justice White acknowledges the empirical evidence that only a tiny proportion of suppression motions succeed or lead to acquittals, but he argues that the costs are nevertheless large in absolute terms. *Id.* at n.6.

¹³ *Id.* The Court began making sure that the exclusionary rule was not getting a free ride in such cases as *United States v. Calandra*, 414 U.S. 433 (1974) and *Stone v. Powell*, 428 U.S. 465 (1976). Cf. *New York v. Quarles*, 467 U.S. 649, 651 (1984) (Court has been willing to accept consequences of *Miranda* rules "when the primary social cost of those

There is an occasional liberal attack on the entire phenomenon of cost-benefit analysis as false economics. The attack is reflected in Justice Brennan's complaint that *Leon*-style cost-benefit analyses are "inherently unstable compounds of intuition, hunches, and occasional pieces of partial and often inconclusive data."¹⁴ Justice Brennan decries "the ritual incantation of the 'substantial social costs' exacted by the exclusionary rule, followed by the virtually foreordained conclusion that, given the marginal benefits, application of the rule in the circumstances of these cases is not warranted."¹⁵ But the usual liberal rebuttal has been to accept the calculus, and then to question the conservatives' data or arithmetic.

Thus, liberals question the actual, empirically observable cost to society of exclusionary rules.¹⁶ Alternatively, they demand better logic or more sociological sophistication in judicial measurements of the deterrent effects of these rules, thereby implying a strong affirmative argument that the doctrine is indeed capable of powerful real-world effects in constraining the state's abuse of political power.¹⁷ But even when they make these arguments, the liberals demonstrate that they are relatively defenseless against the conservative strategy of establishing instrumental and empirical arguments as the relevant terms of debate.

Indeed, the doctrinal argument has absorbed cost-benefit analysis. Thus, Richard Posner's economic arguments about the fourth amendment,¹⁸ though hardly written in doctrinal language, accept the assumption that the doctrines have significant instrumental effects in their intended terms. His analysis is sophisticated in the sense that it does not simply assume that all doctrinal outcomes favoring the police are necessarily socially useful.¹⁹ But Posner is strictly in the mainstream (of course, he has helped define the main-

added protections is the possibility of fewer convictions," but when we add the social cost of physical harm that could be avoided by quick interrogation of suspects "the cost would have been something more than merely the failure to obtain evidence").

¹⁴ *Leon*, 468 U.S. at 942 (Brennan, J., dissenting).

¹⁵ *Id.* at 949.

¹⁶ *Id.* at 950 n.11. (citing, e.g., REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS 14 (1979)).

¹⁷ E.g., *Leon*, 468 U.S. at 955 (Brennan, J., dissenting) (if the exclusionary rule is seen as an educative inducement to police, not as "punishment," it can broadly promote institutional compliance).

¹⁸ Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49.

¹⁹ Posner correctly notes the flaw in the theory that the exclusionary rule cannot deter good-faith police conduct that proves to violate the fourth amendment. Posner concedes that any increase in the penalty for fourth amendment violations will somewhat increase deterrence of these violations. He would apply a good-faith exception only to tort liability, on the theory that excessive financial penalties for police miscon-

stream), when he assumes that fourth amendment doctrine, or at least broad reliance on the exclusionary rule, imposes significant costs, and that a change in doctrine would significantly reduce those costs.

Despite the obvious intellectual attractions of the conventional view, there remains an irreducible uncertainty about the assumed significance of this wonderfully rich political documentation. To the extent that we can identify the relevant data, we find grave empirical doubt that the Supreme Court's doctrine or its associated exclusionary rules have much of the effect that the liberals or conservatives assert they have at the practical level on which policemen and suspects operate.²⁰ Even assuming that the Warren Court's expansive jurisprudence of criminal procedure substantially influenced the world of criminal justice, it remains unclear whether, as the scripted drama would suggest, the Burger Court's reversal of that expansion has had the great influence that a conventional reading of the cases might suggest. Although the apparent change in the political direction of the criminal procedure case law seems to align with perceived changes in the wider world of political attitudes in the United States, it is not clear that the insular, finely-tuned universe of criminal procedure jurisprudence plays that large a role in the political and economic struggles whose rhetoric often sounds in the opinions. But whatever its bases, skepticism about the meaning or the effects of the doctrine has taken a variety of forms in the commentary and, ironically, in the opinions themselves.

III. SOME VERSIONS OF THE SKEPTICAL

A. DENIALS OF HISTORICAL CHANGE

First, one finds a category of views which assume that criminal procedure doctrine is effectual at some level, but which implicitly or explicitly deny the conventional historical view that the Burger Court has dramatically reversed the effects created by an expansive Warren Court jurisprudence. One such view hardly seems to have a

duct will skew their incentive to engage in aggressive conduct that falls just barely on the safe side of the legal rules. *Id.* at 65-66.

²⁰ *E.g.*, Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792 (1970) (trial judges, magistrates, police, and prosecutors are so psychologically predisposed against suspects and defendants that constitutional rights get overwhelmed); Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1982 AM. BAR. FOUND. RESEARCH J. 611 (few suppression motions lead to acquittals or reversals); Note, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967) [hereinafter *Yale Note*] (new *Miranda* rule did not significantly inhibit interrogations or confessions).

skeptical or revisionist theme, because it works within very old-fashioned principles and assumptions we associate with Legal Process jurisprudence. This view does not necessarily deny that the Burger Court doctrine has reversed much of the work of the Warren Court, but it does deny, if only implicitly, the substantive political significance of the doctrinal differences. It thus leaves larger goals essentially unexamined and questions means, focusing on the perennial issues of police (or sometimes magistrate or trial court) discretion.²¹ This view assumes that the police and courts are significantly affected by doctrine, but it does not concern itself much with the economically or politically controversial nature of those effects. Rather, it assumes the problem to be one of establishing the right mix of regulation and discretion in the behavior of police and other actors in the system and views the changes in the doctrine simply as affecting that mix.²² Hence, this view tends to treat doctrinal conflicts in the abstract in terms of choices between bright-line rules and flexible standards,²³ or, at a more practical level, in terms of common sense or sociological or psychological perspectives on how policemen make daily decisions about matters like probable cause or exigency.²⁴

A second form of denial of historical change, chiefly espoused by liberal commentators, engages in a form of refined or revisionist outcome-counting or doctrine-reading. Proponents of this view seem to assume that the doctrine is indeed significant and effectual in its explicit terms, but challenge the conventional view that the Burger Court has done all that much to reverse the Warren court. Recently, Yale Kamisar has suggested that the differences between the Courts have been exaggerated: *Miranda* for example, encroached far less on police interrogation than it might have, and the Burger Court has done far less to retrench on *Miranda* than it might have.²⁵ Similarly, in a comprehensive article assessing almost a decade of Burger Court doctrine, Stephen Saltzburg offers a corrective view of the conventional notion that the police were always the

²¹ See *Discretion in Law Enforcement*, 47 LAW & CONTEM. PROBS. 1 (Autumn 1984)(R. Allen. ed.).

²² E.g., Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REF. 465, 505-12 (1984).

²³ E.g., Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985).

²⁴ See, e.g., Uviller, *The Unworthy Victim: Police Discretion in the Credibility Call*, 47 LAW & CONTEM. PROBS. 15 (1984).

²⁵ Kamisar, *The Warren Court (Was It Really So Defense Minded?)*, *The Burger Court (Was It Really So Prosecution Oriented?) and Police Investigatory Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 62 (V. Blasi ed. 1983).

losers under Warren and then always won under Burger.²⁶ We do indeed tend to forget, or deny, that the Warren Court produced *Warden v. Hayden*,²⁷ *Chapman v. California*,²⁸ and *Hoffa v. United States*.²⁹ Most importantly, it produced *Terry v. Ohio*,³⁰ the conceptual progenitor of all the fine-tuned cost-benefit balancing that has essentially undone the warrant and probable cause rules in the Burger Court. Conversely, we tend to forget or deny that the Burger Court has produced *Brewer v. Williams*,³¹ *United States v. Henry*,³² and *Payton v. New York*.³³ Saltzburg's thesis seems conventional in its assertion that the Court's overall doctrine is essentially sound and effective, but it is unconventional in denying that either in intention or effect, the Burger Court has destroyed the Warren Court's achievements.

Perhaps because of some specific instances of wishful thinking, Saltzburg's article occasionally evinces a tone of rationalization.³⁴ But the rationalizing approach to denial of historical change in the doctrine is more evident in another major comprehensive article, by Jerold Israel, assessing the Burger Court.³⁵ Israel argues for the doctrinal continuity of the two Courts on such fundamental matters as selective incorporation of provisions of the Bill of Rights³⁶ and various forms of economic equality embedded in criminal due process.³⁷ He also reaches backwards from controversial Burger Court

²⁶ Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L. J. 1512 (1980).

²⁷ 387 U.S. 294 (1967)(expanding police search power beyond contraband and instruments of crime to "mere evidence").

²⁸ 386 U.S. 18 (1967)(establishing that constitutional violation can be harmless error at trial).

²⁹ 385 U.S. 293 (1966)(police use of undercover agent for non-coercive conversation not controlled by fourth amendment).

³⁰ 392 U.S. 1 (1968)(establishing police power to stop and frisk suspects without warrant or probable cause).

³¹ 430 U.S. 387 (1977)(reaffirming sixth amendment restrictions on interrogation).

³² 447 U.S. 264 (1980)(reaffirming sixth amendment right even outside context of formal interrogation).

³³ 445 U.S. 573 (1980)(arrest warrant required for arrest of suspect in his home).

³⁴ *E.g.*, Saltzburg, *supra* note 26, at 187 (Burger Court decision in *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973)(holding that police are not required to warn people of fourth amendment rights when requesting consent to search) is consistent with Warren Court decisions on interrogation); Saltzburg, *supra* at 202 (Burger Court's decision in *Rhode Island v. Innis*, 446 U.S. 291 (1980) is consistent with Warren Court view of interrogation, despite its illogical application to reject fifth amendment claim in same case).

³⁵ Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319 (1977).

³⁶ *Id.* at 1327-31. It is difficult to determine whether Attorney General Edwin Meese III will try to induce discontinuity on this matter.

³⁷ *Id.* at 1331-39. At least two decisions from last Term support Israel's position on

decisions to suggest that the Warren Court might not have disapproved of these decisions. More than Saltzburg, Israel engages in a form of rationalization that suggests that he might somewhat disingenuously be urging the Burger Court itself not to believe its own express intentions, or at least that he hopes liberal lower courts will look for some political margin left by the Burger Court.³⁸ Somewhat more convincingly, Israel suggests that even if we read Warren and Burger Court doctrine as fundamentally inconsistent, the Warren Court doctrine had important practical effects on police behavior which, because of governmental inertia or caution, will survive the doctrinal reversal.³⁹

The most original and sophisticated version of the denial of historical change in the doctrine is that of Louis Seidman.⁴⁰ He challenges the conventional view of doctrinal discrepancy between the Warren and Burger Courts, not by outcome-counting or doctrinal rationalization, but by raising the question to a more abstract level. Seidman attacks the specific version of the conventional view that the Burger Court's reversal of Warren Court due process has taken the form of redirecting criminal procedure law toward the primary goal of determining the guilt or innocence of defendants and derogating those values or rights which serve goals other than truthful fact-finding.⁴¹ He interprets the cases to show that the Burger Court, no less than the Warren Court, has asked the criminal justice system to do far more than to separate the guilty from the innocent; it too has used the criminal prosecution as a means of broader social

this point. In *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985) (due process entitles defendant to state-provided psychiatrist when he claims insanity in capital case), and *Evitts v. Lucey*, 105 S. Ct. 830 (1985) (sixth amendment right to effective assistance of counsel extends to direct appeal), the Burger Court has confirmed or extended the concept that criminal defendants are entitled to roughly equal or symmetrical litigation resources at trial or on appeal, though of course the Burger Court takes a different view of pre-trial matters.

³⁸ For a somewhat torturous rationalization of one of the most notorious Burger Court decisions, *Kirby v. Illinois*, 406 U.S. 682 (1972) (right of counsel at line-up only applies after state brings formal charges by indictment or otherwise), and for an argument that the related case of *United States v. Ash*, 413 U.S. 300 (1973) (no right of counsel at photo-identification procedure) might not have offended the Warren Court that produced *United States v. Wade* 388 U.S. 218 (1967), see Israel, *supra* note 35, at 1368 n.224, 1370-72. See also, *id.* at 1374 (Burger Court restrictions on scope of *Miranda* implicitly accept fundamental premises of *Miranda*).

³⁹ Israel, *supra* note 35, at 1424 n.438 (Warren Court decisions induced greater sense of "professionalism" among criminal lawyers on both sides, and enhanced interest in legislative reform).

⁴⁰ Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980).

⁴¹ Seidman attributes this version of the conventional view to both commentators and the language of the Burger Court itself. *Id.* at 437.

engineering, though the goals of the engineering have changed since the Warren days. Criminal defendants remain bit players in a larger regulatory drama. For the Burger Court, accurate determination of guilt or innocence is less important than the functional perception of the system as a tool of crime control.⁴²

In Seidman's view, though we may have learned from the Warren era that we cannot afford a criminal justice system that separates the guilty from the innocent, deters government misconduct, and serves broader social goals, the Burger court is making similar mistakes. Indeed, the Burger Court has reached pro-defendant outcomes to serve such goals as general racial equality⁴³ and pro-state decisions which at least recognize the importance of even those constitutional rights which disserve truthful fact-finding.⁴⁴ But in the great number of cases where the Burger Court's outcome has favored the state, the doctrine nevertheless is concerned with matters other than guilt or innocence: matters like controlling the conduct of the criminal defense bar,⁴⁵ or ensuring the broad general deterrent effect of the substantive criminal law regardless of the moral desert of the individual defendant.⁴⁶

B. MAINSTREAM NIHILISM.

Next is a set of views which explicitly doubt the significance or effectuality of the entire doctrinal enterprise of fourth, fifth, and sixth amendment and due process rights. These views hold that the doctrine, whether in rhetoric or outcome, and regardless of any historical doctrinal changes, does not matter all that much, because it does not affect the actual workings of the system. I call this category "mainstream nihilism," because in treating the practical world to

⁴² *Id.* at 437-48.

⁴³ *Rose v. Mitchell*, 443 U.S. 545 (1979)(claims of racial discrimination in selection of grand jury foremen can be raised on federal habeas).

⁴⁴ Seidman argues that *Stone v. Powell*, 428 U.S. 465 (1976)(fourth amendment claims generally cannot be raised on federal habeas) at least conceded that the fourth amendment necessarily disserves truthful fact-finding at trial in the name of other goals. Seidman, *supra* note 40, at 451-54.

⁴⁵ *Wainwright v. Sykes*, 433 U.S. 72 (1977)(limiting defendant's right to raise on federal habeas constitutional claims waived at state trial where the defendant cannot disprove that his defense counsel may have deliberately "sandbagged" state processes).

⁴⁶ Seidman argues that the Burger Court's plea bargaining decisions in such cases as *Blackledge v. Perry*, 417 U.S. 21 (1974)(voluntary guilty plea does not waive claim that defendant's felony indictment was prosecutor's vindictive reaction to defendant's appeal from misdemeanor conviction for same crime) and *Brady v. United States*, 397 U.S. 742 (1970) (guilty plea upheld where defendant made plea to life imprisonment even though conviction at trial may have led to death penalty under federal statute later held unconstitutional) reveal that the Court has pursued goals wholly independent of establishing the factual guilt of particular defendants. Seidman, *supra* note 40, at 470-83.

which the doctrine is supposedly irrelevant, it describes that world in fairly ordinary terms correlative with conventional liberal or conservative politics. I therefore want to distinguish it from more socially critical forms of doctrinal nihilism, which I describe below.

1. *Simple Empiricism*

The most straightforward version of this view, which one finds more in casual contact with criminal lawyers than in academic commentary, is simply that relatively few cases raise serious constitutional or procedural problems of law or fact. This simple version of empirical irrelevancy is obviously at least consistent with the empirical studies that suggest that the major doctrinal efforts of the Warren Court have had very small effects on crime rates,⁴⁷ or conviction rates,⁴⁸ or on the relationship between police and suspects,⁴⁹ though it is rather obviously not the only way to explain those empirical results.⁵⁰ This view obviously is subject to charges of circularity or economic naivete: if few cases appear to reveal constitutional issues, it may be because few defendants can afford or obtain lawyers who are skillful enough to detect and litigate these issues, or because the dishonesty of policemen, the ignorance of suspects, and the incompetence of courts converge to create the appearance that few cases raise constitutional issues. This charge damages the simple empirical argument, but I prefer to address it below under the rubric of critical nihilism.

2. *The Irrelevance of Prosecution*

The simple empirical argument is compatible with the rather questionable notion that the fully-litigated trial model accurately captures our criminal justice system. Its point is that trials tend to be about guilt or innocence, not about procedural issues that control the court's or jury's decision about guilt or innocence. Somewhat stronger, more sharply skeptical versions of "mainstream nihilism" attack the litigation-model more directly. Ironically, one of these versions finds a source in a famous, cryptic passage in Chief Justice Warren's opinion in *Terry v. Ohio*,⁵¹ where Warren laments that recognizing constitutional rights by the device of exclusionary

⁴⁷ See generally Seidman, *supra* note 40, at 439 n.13.

⁴⁸ E.g., Davies, *supra* note 20.

⁴⁹ E.g., Yale Project, *supra* note 20.

⁵⁰ Among other things, it is also possible that the police enjoy some form of impunity for their violations, or that police abuses are too subtle to be captured by any empirical study.

⁵¹ 392 U.S. 1 (1968).

rules may be futile because most of the abuses police commit on people occur wholly outside the context of criminal prosecution, and thus cannot be affected by rules designed to influence the conduct or content of litigation. Warren's intriguing remarks deserve more attention than they have received for their striking tonal pretense of purported social realism and practical skepticism:

Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime Doubtless some police "field interrogation" conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. The wholesale harassment by certain elements of the police community, of which minority groups . . . complain, will not be stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used to control, may exact a high toll in human injury and frustration of efforts to prevent crime. No judicial opinion can comprehend the protean variety of the street encounter⁵²

In short, the exclusionary rule may be irrelevant to the larger political effects of the criminal justice system, because the trial model, indeed prosecution itself, is not central to the criminal justice system, which is a diverse cultural and "protean" system of power-assertion. This is an amazing concession by Chief Justice Warren at the end of his career, and, were it supported by other evidence that he was a reflective legal scholar, it would have fascinating biographical significance.⁵³

3. *Plea Bargaining*

The most frequently expressed version of mainstream nihilism, and the one with the most empirical support, is the version that focuses on plea bargaining. In this view, the entire doctrinal enterprise revolving around searches and seizures, confessions, and the

⁵² *Id.* at 13-14.

⁵³ There is some evidence, however, that the idea for this passage came from Justice Brennan. B. SCHWARTZ, *SUPER CHIEF* 688 (1983).

like floats blithely and irrelevantly above a gritty unregulated market of plea bargaining in which the exchange of the crude commodities of the system, not any regulatory norm, governs the disposition of cases.

Of course, while the vast majority of cases are bargained without any formal litigation, this hardly establishes the irrelevancy of criminal procedure doctrines. The most formal economic model of plea bargaining indeed implicitly accommodates the doctrine and even suggests that the doctrine achieves more precise and sensitive effects in the world of plea bargaining than in the world of trials. In Frank Easterbrook's model,⁵⁴ bargaining between defendants and prosecutors sets prices for crimes—or rewards for pleas—that accurately reflect the probabilities of outcome at trial. He argues that those numbers accurately discount the probability of outcomes of verdict-controlling suppression motions as well as the probability of the verdicts themselves, and indeed better reflect the subtleties of the procedural doctrines because, unlike actual trials or suppression motions, they do not arbitrarily “round off” the probabilities.⁵⁵ On the other hand, even if we deny that the doctrine rationally affects prices in the market, we might join John Langbein in treating the doctrine as affecting the market in a more fundamental—and more perverse—way: Plea bargaining may be an irrational and unfair thing, but it only exists because Warren Court-style procedural jurisprudence has so effectively raised the cost of criminal trials that it has forced prosecutors to create, and defendants to accept, a relatively cheap alternative system.⁵⁶

Liberal critics of plea bargaining, led by Albert Alschuler, essentially have made doctrinal nihilism a part of their criticism of this legal underworld. In this view, Easterbrook's vision of a market accurately pricing constitutional rights is an absurd economic fantasy, and Langbein's argument that constitutional rights are effectual in a perversely self-destructive way wrongly attributes plea bargaining to rational economic behavior by responsible prosecutors and judges.⁵⁷ Rather, plea bargaining results from cynical and lazy judges who search for deals indiscriminately; prosecutors whose only goal is to rack up dispositions or accommodate the cynical, lazy judges; public defenders who are too overwhelmed to even attempt serious litigation of procedural issues; and narrow-minded privately

⁵⁴ Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUDIES 289 (1983).

⁵⁵ *Id.* at 316-17.

⁵⁶ Langbein, *Torture and Plea Bargaining*, 58 PUB. INTEREST 43 (1980); *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 205 (1979).

⁵⁷ Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 690 (1981).

appointed defense lawyers whose perceived economic incentives bear no correlation to their clients' interests.⁵⁸ In this world, the procedural doctrines are irrelevant, compromised, and ignored.⁵⁹

4. *The Worlds of Harmless Error*

One final version of nihilism is so "mainstream" that it has its source in Burger Court doctrine itself. A large category of supposedly disparate doctrines has emerged over the last few years that may be very loosely placed under the principle of "harmless illegality." The notion of harmless constitutional error officially started in the Warren Court's *Chapman*⁶⁰ decision and bears an interesting relationship to the somewhat different form of doctrinal skepticism I noted earlier in Warren's *Terry* opinion. The *Terry* passage questioned the importance of the trial model to the Court's own procedural doctrine by suggesting that many unconstitutional police actions occur outside the context of litigation and so cannot find any remedy in rules of exclusion. The harmless error rule, by contrast, accepts the litigation model of the criminal justice system and also assumes, contrary to the "simple empirical irrelevancy view" described earlier, that many criminal prosecutions reveal constitutional violations. The harmless error approach assumes, however, that we can reconstruct the world of the criminal trial after subtracting the constitutionally inadmissible evidence that the violations produced and thereby determine whether the violations had any effect on the guilty verdict.

"Harmless error," then, is a form of doctrinal skepticism: it "discovers" that procedural doctrine is often irrelevant because the exclusionary remedies normally entailed by the doctrine often have no effect on trials. This is true, in turn, because, as a supposedly empirical matter, most cases produce far more prosecution evidence than the jury needs to establish reasonable doubt, and most of that evidence arises without any constitutional problems. The Burger Court has shown renewed interest in the harmless error approach to the reconstruction of the criminal trial in recent cases, expressly invoking the term "harmless error,"⁶¹ as well as in cases where the theory masquerades in other guises.⁶²

⁵⁸ *Id.*

⁵⁹ *Id.* at 713.

⁶⁰ *Chapman v. California*, 386 U.S. 18 (1967).

⁶¹ *United States v. Young*, 105 S. Ct. 1038 (1985) (illegal prosecution argument not "plain error" where invited and not objected to by defense counsel, and which does not "undermine the fundamental fairness of the trial and contribute to a miscarriage of justice").

⁶² *E.g.*, *United States v. Bagley*, 105 S. Ct. 3375 (1985) (plurality opinion)(in cases of

One of the most interesting developments in recent Burger Court doctrine is a form of "harmless error" review which reconstructs and evaluates the world *outside* the criminal trial to determine the effects of conceded constitutional violations. This indirect doctrinal maneuver enables the Court to apparently respect Warren Court procedural doctrine for its moral validity, while adopting a wizened pose of realism about the effects of the doctrine. It purports to discover a world of criminal investigation in which constitutional violations play a minor role and shifts the burden of any uncertainty about this world on to defendants. The skepticism of this "harmless violation" approach is a more complex matter than the skepticism of trial-based harmless error, since there is more potential misinterpretation and circularity in reconstructing the real world outside the trial than in reconstructing the trial itself.

The new approach has arisen in cases which, in the Court's persistent but unconvincing view, fall into separate doctrinal categories like "inevitable discovery," "independent source," and "dissipation of the taint" within the general doctrine of the "fruits of the poisonous tree." The most obvious example is *Nix v. Williams*,⁶³ which revealed a situation so bizarrely conducive to this new doctrine that even Justice Brennan disputed the result only obliquely. In *Nix*, the Court left intact its own earlier holding that the "Christian Burial Speech" interrogation by the Iowa police was flagrantly unconstitutional.⁶⁴ Yet it reconciled that holding with a second conviction on retrial in which the prosecutor again introduced physical evidence—the victim's body—to which the defendant Williams led the police after the illegal interrogation.⁶⁵ *Nix* held that the illegal interrogation was essentially causally irrelevant to the discovery of the body because a separate course of investigation by the police—a sweeping search across the Iowa terrain—was about to lead them to the body

the prosecution's failure to disclose requested exculpatory evidence, even where defense counsel makes specific request, standard for reversal is whether there is a "reasonable probability that, had the evidence been disclosed . . . the result of the proceeding would have been different"; reasonable probability is one "sufficient to undermine confidence in the outcome," (citing *Strickland v. Washington*, 466 U.S. 668 (1984))(similar standard for claims of ineffective assistance of trial counsel)).

⁶³ 467 U.S. 431 (1984).

⁶⁴ In *Brewer v. Williams*, 430 U.S. 387 (1977), the police were transporting Williams, arrested for the murder of a girl, across Iowa after he had been arraigned and had obtained counsel. Though the lawyer had warned the officers not to question Williams, they nevertheless elicited from Williams information about the location of the girl's body: Knowing Williams to be religious, they induced him to talk by reminding him that the girl deserved a Christian burial. *Id.* at 389-92. The Court held that the police had thereby violated Williams' sixth amendment right to counsel. *Id.* at 400-06.

⁶⁵ *Nix*, 467 U.S. at 437.

anyway.⁶⁶ Even Justice Brennan had a hard time disputing that in this extreme case the Court was not clearly wrong in its empirical skepticism about the practical consequences of the constitutional violation, though his dissent really compounds rather than addresses the confusion created by Chief Justice Burger's majority opinion as to how to generally allocate the burden of this empirical skepticism.⁶⁷

It was not enough for the Court in *Nix* to establish a legitimate independent or concurrent cause of the discovery of the evidence. To remain faithful to its supposedly realistic, functional view of the exclusionary rule, the Court also had to demonstrate that the presence of this independent causal route meant that exclusion of the evidence could not serve the goal of generally deterring police violations of the constitution. The Chief Justice's efforts in *Nix* and other cases to make this demonstration have been derided as illogical.⁶⁸ Indeed, the anti-exclusion argument about deterrence might be seen as another version of skepticism itself, a form of psychologi-

⁶⁶ *Id.* at 437-38.

⁶⁷ The majority opinion offers the somewhat perplexing proposition that the state need only prove the "inevitability" of the discovery by a preponderance of the evidence, *id.* at 444, while Justice Brennan suggested that the standard was clear and convincing evidence. *Id.* at 459-60. Thus, "inevitable discovery" is not a very useful description of the issue.

⁶⁸ With regard to the evidence directly resulting from illegal police action, Chief Justice Burger described the deterrence rationale as requiring that "the prosecution is not to be put in a better position than it would have been if no illegality had transpired." *Id.* at 443. But "the derivative evidence analysis ensures that the prosecution is not put in a worse position simply because of some earlier police error or misconduct." *Id.* Chief Justice Burger implicitly relies on an analogy between the exclusionary rule and liability principles derived from tort law or substantive criminal law. While it may seem unfair to hold a person liable for harm that would have occurred even despite the person's wrongful action, in some doctrines, such as the law of attempt of complicity, we actually do relax the requirement of proof of actual cause of harm. But analogies to liability rules are unpersuasive in criminal procedure because the exclusionary rule does not "punish" individual policemen. Rather, the goal of the rule is deterrence, and if police departments know that they will lose inculpatory evidence that is in any way associated with their illegal conduct, they will encounter a useful disincentive. Chief Justice Burger also is illogical when he rejects the "good faith" qualification to the "inevitable discovery" principle. *Id.* at 445. By excluding evidence even where the police act in good faith, we create a rule of negligence or even strict liability, but the concern for moral proportionality that often leads us to reject negligence or strict liability rules is similarly inapposite to the exclusionary rule. Even if we assume that a policeman who honestly but wrongly thinks he is obeying the fourth amendment cannot be deterred, imposing a sanction for that violation still serves to generally deter other policemen who do not act in such good faith. Otherwise, those other policemen might interpret the lack of sanction in the earlier case as generally sanctioning violations of the fourth amendment. Also, the sanction reduces the chances of a wily policeman contriving good-faith claims. For a famous explanation of the analogous problem in criminal law, see H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 18-20 (1968).

cal skepticism about the degree to which police officers ever advert to the potential legal consequences of their actions.

The most striking aspect of this new doctrine is its notion of how we can, if at all, reconstruct the world minus the violation. The Court claims the same sort of confidence in this type of reconstruction as it does when it reconstructs trials under conventional harmless error analysis. But to do so, the Court must make some rather arbitrary, circular assumptions about this counter-factual reality. The most intriguing assumption arises in *Segura v. United States*,⁶⁹ a hardly-noticed case which is in fact one of the Burger Court's most bizarre decisions. The facts of *Segura* are complicated and disputed, but the gist for present purposes can be simplified. The police illegally entered Segura's apartment without a warrant, illegally arrested and removed him, and proceeded to "seize" the apartment for almost twenty hours, with perfectly visible contraband lying in plain view. Meanwhile, other officers, relying on sound probable-cause evidence which they obtained wholly independently of the seizure of the apartment, apparently struggled for that same period to find a magistrate. When they finally got a valid warrant, they entered the apartment to take the contraband.⁷⁰

Oddly distinguishing the "independent source" doctrine applicable here from the "inevitable discovery" doctrine of *Nix*, Chief Justice Burger held in effect that the legal route to the evidence taken by the police who sought, obtained, and executed the warrant constituted an independent cause of the police getting the evidence. Thus, the illegal entry of the apartment was irrelevant to the discovery of the evidence.⁷¹ Alternatively, to use the terms I have suggested, Segura's rights under fourth amendment doctrine had no practical effect in the real world of the investigation. Obviously, the Chief Justice adopted a rather self-serving image of that real world. By holding it extraneous that the illegal seizure of the apartment made it possible for the supposedly "independent" legal route to the evidence to succeed, the Chief Justice once again adopted a pose

⁶⁹ 468 U.S. 796 (1984).

⁷⁰ *Id.* Chief Justice Burger questioned whether the entry was illegal in the first place and whether a certain portion of the evidence discovered in purported plain view immediately upon entry should be excluded, but he was bound by lower-court rulings which the government did not challenge. *Id.* at 804.

⁷¹ *Id.* at 811. The Chief Justice asserted that even if the entry was illegal, the subsequent "seizure" of the apartment was legal, holding, in effect, that the police have the power to engage in what might be called an "internal stake-out" of private premises if that action is reasonably necessary to preserve evidence for a warrant-based search. *Id.* Even if his distinction between invasions of "possessory" and "privacy" interests is logical, the Chief Justice does not explain why the seizure of the apartment was not the "tainted fruit" of the illegal entry.

of wizened skepticism: It was mere "speculation" whether Segura or a confederate would have removed and destroyed the evidence while the police searched haplessly for a magistrate.⁷²

Perhaps not confident to rest the case on this somewhat misplaced effort at practical realism, the Chief Justice adopted in the alternative a somewhat normatively qualified view of the reconstructed real world: Even if we were to assume that, had the illegal entry not taken place, Segura or an ally would have removed or destroyed the evidence, that empirical possibility did not deserve any constitutional recognition. Therefore, the Chief Justice "declined to protect criminal activity" by recognizing, in effect, a "right" to destroy evidence.⁷³ Yet, as Justice Stevens pointed out, though there may not be, strictly speaking, a right to destroy evidence, one of the premises of fourth amendment law is that the constitution limits the state's access to evidence.⁷⁴ Thus, the Constitution, in effect, indirectly protects an opportunity to destroy evidence. In his contrived skepticism about the effects of fourth amendment doctrine and fourth amendment violations, the Chief Justice qualifies his picture of the real world to ensure that the world is not better for criminal suspects than they deserve.

A final example of the Court's "skepticism" maneuvers arises in the area of confessions. In one line of cases involving *Miranda* rights a few years ago, the Supreme Court had revealed an interesting form of skepticism about the effect of constitutional doctrine in the practical world, concluding that people who are not formally warned of their *Miranda* rights must be presumed not to know they have them or not to act on their knowledge of them.⁷⁵ The Court's posture of realistic doubt about the effect of legal doctrine took a controversial twist in one of the most rhetorically overheated cases from last Term, *Oregon v. Elstad*.⁷⁶ *Elstad* presented a new permutation of *Miranda* rights and "fruits of the poisonous tree" doctrine. *Elstad* had mumbled a very damning admission to the police after an apparently illegal interrogation, and then gave a second confession af-

⁷² *Id.* at 815-16.

⁷³ *Id.*

⁷⁴ *Id.* at 835 (Stevens, J., dissenting). Justice Stevens also correctly notes that the deterrence rationale for the exclusionary rule, even as somewhat illogically constructed by the Burger Court, applies very obviously in *Segura*, since the police engaged in the extended seizure of the apartment precisely in order to wait for the search warrant. In other words, the police tried to reap the benefits of a generous "independent source" exception to the exclusionary rule. *Id.* at 836 (Stevens, J., dissenting).

⁷⁵ See, e.g., *Jenkins v. Anderson*, 446 U.S. 231 (1980) (prosecutor can impeach defendant's credibility by questioning the defendant about pre-arrest silence before arrest and the giving of *Miranda* warnings).

⁷⁶ 105 S. Ct. 1285 (1985).

ter he got the full *Miranda* warnings.⁷⁷ The Court held that the illegality of the first interrogation did not necessarily taint the second confession, especially where the first statement, though it did reveal a violation of *Miranda*, did not offend the deeper norm requiring that confessions or admissions be voluntary.⁷⁸

Most interestingly, Justice O'Connor's majority opinion manages to get on the sophisticated, hard-headed side of the debate over how the world really operates. Rejecting the defendant's psychological argument that he was virtually destined to make the second statement after assuming he had damned himself with the first,⁷⁹ she affects a skeptical view of human volition and puts the burden of the resulting psychological uncertainty on the defendant. The opinion concludes that "[t]he causal connection between any psychological disadvantage created by his admission and his ultimate decision to cooperate is speculative and attenuated at best. It is difficult to tell with certainty what motivates a suspect to speak"⁸⁰ Expanding on a view of the causation of human speech hinted at in earlier cases,⁸¹ Justice O'Connor concludes that although *Miranda* doctrine abstractly reflects moral principle, a realistic assessment of human behavior casts doubt on whether the doctrine has much effect.

C. THE CRITICAL VERSION OF SKEPTICISM

Fifty years ago, Thurman Arnold described the entire system of criminal litigation as a perpetual dramatic ceremony which celebrates the competition of contrasting political ideals in our culture.⁸² Arnold's playful aestheticism, the gentle tone of his iconoclasm, and his refusal to cast it in cynical terms probably have

⁷⁷ *Id.* at 1289-90.

⁷⁸ *Id.* at 291-94.

⁷⁹ The defendant and Justice Brennan, in dissent, cited several police interrogation manuals which instructed policemen that once a suspect felt that he had let "the cat out of the bag" with one inculpatory statement, the suspect was likely to make a full confession. The manuals spoke in other metaphors like "collapsing structure" or "beach-heads," *id.* at 1303-04 (Brennan, J., dissenting); so in her majority opinion, Justice O'Connor purported to take a realistic stance by rejecting excessive reliance on metaphor. *Id.* at 1290.

⁸⁰ *Id.* at 1296.

⁸¹ *E.g.*, *United States v. Ceccolini*, 435 U.S. 268, 277 (1977) (the Court held that a fourth amendment violation that led the police to identify a third-party witness did not require the suppression of that witness's testimony as "tainted fruits" since a "living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give." *Id.* at 277 (quoting *Smith v. United States*, 324 F.2d 879, 881-82 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 954 (1964)).

⁸² T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 128 (1935).

masked how important his work is for more bitingly critical views of legal doctrine that have captured much contemporary legal scholarship. Arnold's essay is a reminder that there is an important type of skepticism about legal doctrine that can take doctrine very seriously, but not necessarily in the terms in which doctrine describes itself. This type of skepticism adopts a posture of something approaching a cultural anthropology of the system of doctrine-making. Despite the tremendous growth in contemporary critical studies of legal doctrine, studies rooted in both ideological and structuralist premises, the critical approach to criminal procedure has advanced surprisingly little beyond Arnold's observations.

Of the few efforts in this direction, one of the most important is Peter Arenella's assessment of over a decade of Burger Court criminal procedure doctrine in terms of basic questions about the functions of the whole system.⁸³ Professor Arenella has attacked the view of the doctrine that denies the discontinuity between the Warren and Burger Courts, and he shifts the perspective on the doctrine to a more critical angle. He argues that revisionist outcome-counting produces a shallow assessment of the two Courts.⁸⁴ Arenella also contends that Seidman's subtler comparison, which finds the rejection by both Courts of a pure guilt/innocence model of procedure to be a significant common denominator, grossly understates the fundamental differences in political and social philosophy.⁸⁵ According to Arenella, the Burger Court has exhibited a reactionary inclination to deregulate judicial control of state officials, a hostility to political norms of fair process, and a willingness to reduce civil liberties to contrived measurable factors in a conservative utilitarian calculus.⁸⁶

But in rebutting some of the revisionist responses to what I have called the conventional view, Arenella does not reaffirm the conventional view. His is a rare attempt in the literature to treat the cases seriously as ideological exercises while maintaining a very realistic skepticism about the immediate or obvious effects of the doctrine which the conventional view assumes. Professor Arenella is careful not to assume any simple correlation between legal doctrine and legal or political practice. But as he elaborates on his "reconstructed" due process and crime control models, he suggests that we cannot disprove that the ideological content of the case law has

⁸³ Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983).

⁸⁴ *Id.* at 186-87.

⁸⁵ *Id.* at 195-97.

⁸⁶ *Id.* at 247.

influenced in a host of indirect ways the processes of legislative and bureaucratic reform and professional training, and the public's perception of the criminal justice system.⁸⁷ I would add that even in a state of uncertainty about the discernable effects of doctrine, the striking invasion of the rhetoric of the larger contemporary political debate into criminal procedure opinions suggests some sort of mutually reinforcing relationship.⁸⁸

Arenella cautiously stops short of the more politically charged critical perspective which asserts that the doctrine is designed to be an exercise in ideological legitimation, that it is utterly deceptive or irrelevant in all the functional or political terms in which the conventional analysts address it.⁸⁹ Ironically, this more purely critical view holds that the doctrine indeed possesses a great deal of real-world force, but only in deceptive and perverse terms. Even if we assume that the doctrine lends fairness and neutrality to the adjudication of guilt while protecting dignitary values, the system is hypocritical and, indeed, it is designed to be hypocritical. It consists largely of the false promises of a system engaged in symbolic legitimation of an unjust legal and economic system. The promises of due process doctrine are false because of a number of things: the cynical market of plea bargaining, the vagueness of the doctrinal rules or norms which makes them so subject to evasion and manipulation, the vagaries of fact-finding, the unaffordable price of good representation, and the political and economic prejudice at the heart of the substantive criminal laws to which the procedural doctrines are purely adjectival.⁹⁰

This view faces the obstacle of explaining why, if due process doctrine is designedly hypocritical, the Burger Court has found it necessary to reverse the Warren Court's ideological efforts.⁹¹ Nevertheless, this viewpoint does find some striking support in such matters as the Burger Court's insistence on proper litany of waiver

⁸⁷ *Id.* at 226 n.230.

⁸⁸ Liberal dissents now regularly include rhetoric from the larger contemporary legal debate. *E.g.*, *New York v. Quarles*, 467 U.S. 649, 681 (Marshall J., dissenting) ("majority now proposes to return to the scales of social utility to calculate whether *Miranda*'s prophylactic rule remains cost-effective when threats to public's safety are added to the balance" with "pseudoscientific precision"). *Cf.* *Elstad*, 105 S. Ct. at 1301 (1985) (Brennan, J., dissenting) (denouncing the majority's "marble-palace psychoanalysis" and suggesting that it is a psychological myth designed to justify retrenchment on *Miranda* principles and to disdain determinist accounts of suspects' behavior).

⁸⁹ Rudovsky, *The Criminal Justice System and the Role of the Police*, in *THE POLITICS OF LAW* 242 (D. Kairys ed. 1982).

⁹⁰ *Id.* at 243.

⁹¹ Arenella, *supra* note 81, at 227 n.230.

in plea bargaining,⁹² and a terrific example in the one major area where the Burger Court has purported to retain and indeed strengthen the suspect's freedom from coercive police investigation: the sixth amendment right to counsel which grants defendants expanded *Miranda*-style rights so long as they have passed a wonderfully symbolic barrier in the course of the prosecution.⁹³ These examples suggest that the Court sometimes engages in politically useful mythology about the free will of people who encounter the state and about the imagery of informality with which the state can choose to describe its encounters with people when it finds it useful to do so. Even though often exaggerated, the extreme critical view is a useful corrective to the common tendency to take too literally the seductive and distracting political symbolism of American criminal procedure doctrine.

IV. CONCLUSION

To some extent, these varieties of skepticism about criminal procedure doctrine reflect a sense that the discrepancy between the world of the courts and the world in which the courts are supposed to operate is even greater in the earthy instance of criminals and police than it is elsewhere, that the political melodrama is played out in a happily naive world of Thomistic abstraction. To some extent, at least from the liberal perspective, it is due to a concern that the political promises of the Warren Court were quixotic or illusory, or to a hopeful disbelief that if they did have substance, their effects could be so quickly and drastically reversed. But underlying these skeptical impulses may be a half-conscious recognition that the doctrine is less important in achieving its supposed goal—the proper administration of criminal justice—than might once have appeared to be the case.

⁹² For example, in *Henderson v. Morgan*, 426 U.S. 637 (1976), the Court reversed the murder conviction of a defendant with an I.Q. of approximately seventy, finding the guilty plea invalid because the trial judge had failed to explain to the defendant that intent was an element of the offense. As Seidman observes, the Court reversed the conviction only because the trial court had failed to observe the niceties of the plea bargaining litany, even though the defendant would probably not have understood the litany anyway, and even though his hypothetical understanding would have done him little good because the plea bargaining system had permitted a structure of incentives that made self-condemnation the most rational course anyway. Seidman, *supra* note 40, at 481-82.

⁹³ See *Maine v. Moulton*, 106 S. Ct. 477 (1985) (after state brings formal charges against suspect, sixth amendment right to counsel bars it from circumventing defense lawyer by using jailhouse informant to elicit inculpatory statements about other crime); *Kirby v. Illinois*, 406 U.S. 682 (1972) (right to counsel at lineup arises only after state brings formal charges).

The conservative version of the conventional view appears wrong in suggesting that restricting the exclusionary rules of evidence will somehow solve the crime problem in the United States; rather, the crime problem can probably be solved only by more expensive state action, assuming that it can be solved by state action at all. The liberal version may also be wrong in suggesting that judicial review of police action can ever significantly curtail the state's abuse of people in the criminal justice system, either because most police abuse will go unregulated by anything short of greater bureaucratic control than our system now contemplates, or because the real source of the problem lies in broader social and economic inequities that determine who winds up in the system in the first place. In any event, we may be seeing signs of a deflationary phase in the legal politics of criminal justice.

In practical political terms, this "deflation" may prove more useful to the liberals. The conservatives have largely won their short-term goal of casting the current doctrinal issues in economic terms. And once the economic agenda is set, the liberals seemed destined to lose. In the criminal procedure cases, as in the capital punishment cases, the conservatives always get the benefit of the public's wish-fulfilling denial of the empirical weakness of the case for law-enforcement, or at least the benefit that in cases of insoluble empirical uncertainty, their assertions carry greater rhetorical attraction than the liberals'. Most people in this country find images of judges allowing muggers and killers on the streets far more compelling than images of agents of a police state terrifying us in our houses. Nevertheless, a new "deflationary" phase may present an opportunity for both the liberal and conservative sides to make some realistic adjustments in their approaches to the work of the Supreme Court, and to look to places other than the Court for ways of addressing the larger questions about criminal justice.